NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS STATE OF ARIZONA **DIVISION TWO**

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COURT OF APPEALS DIVISION TWO

| THE STATE OF ARIZONA, |) | | | | |
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| |) 2 CA-CR 2010-0347 | | | | |
| Appellee, |) DEPARTMENT B | | | | |
| |) | | | | |
| v. |) <u>MEMORANDUM DECISION</u> | | | | |
| |) Not for Publication | | | | |
| AMIN SHAHEED MUHAMMAD-ALI, | Rule 111, Rules of | | | | |
| |) the Supreme Court | | | | |
| Appellant. |) | | | | |
| | _) | | | | |
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| APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY | | | | | |
| Cause No. CR20084010 | | | | | |
| Honorable Deborah Bernini, Judge | | | | | |
| AFFIRMED | | | | | |
| | | | | | |
| Thomas C. Horne, Arizona Attorney Genera By Kent E. Cattani and Alan L. Amann | ıl Tucson | | | | |
| by Kent E. Cattain and Alan E. Amann | Attorneys for Appellee | | | | |
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| Barton & Storts, P.C. | | | | | |
| By Brick P. Storts, III | Tucson | | | | |
| • | Attorneys for Appellant | | | | |

ESPINOSA, Judge.

After a jury trial *in absentia*, Amin Muhammad-Ali was convicted of attempted first-degree murder, aggravated assault with a deadly weapon or dangerous instrument, and aggravated assault resulting in temporary or substantial disfigurement. The trial court sentenced him to concurrent, maximum prison terms, the longest of which was twenty-one years. On appeal, he argues that he was denied his right to a speedy trial and that the court erred in denying his request for funds for scientific analysis of certain evidence. For the following reasons, we affirm.

Factual Background and Procedural History

We view the evidence in the light most favorable to sustaining the verdicts, resolving all reasonable inferences and conflicts in the evidence against the defendant. *State v. Wassenaar*, 215 Ariz. 565, ¶ 2, 161 P.3d 608, 612 (App. 2007). Late one night in October 2008, appellant approached the door of his mother and stepfather's home carrying a pizza box and a gun. When appellant's stepfather, B.B., came to the door, he recognized appellant but did not see the gun because it was hidden by the pizza box. Without opening the door, B.B. told appellant to go home. Appellant fired the gun, and a bullet broke through the window beside the door, passed through B.B.'s hand, face, and neck, and ultimately lodged in his shoulder. Appellant left the house and was arrested

¹Although appellant was in custody at the time of his trial, he filed a written waiver of his right to be present at trial, which the court accepted as knowing, intelligent, and voluntary. *See* Ariz. R. Crim. P. 9.1; *State v. Tacon*, 107 Ariz. 353, 357, 488 P.2d 973, 977 (1971), *criticized on other grounds by State v. Davis*, 108 Ariz. 335, 498 P.2d 202 (1972).

shortly thereafter as he was driving away. B.B. was hospitalized and eventually recovered.

- Because the first issue raised in this appeal is procedural in nature, we describe the trial court proceedings in detail. On October 24, 2008, appellant was arraigned and the Pima County Legal Defender's Office was appointed to represent him. In November, his counsel filed a motion to withdraw, citing irreconcilable differences, and the Pima County Public Defender's Office was appointed as substitute counsel. In March 2009, appellant moved for a mental-health examination pursuant to Rule 11, Ariz. R. Crim. P., to determine whether he was competent to stand trial. The trial court granted the motion and stayed proceedings pending the competency determination.
- In July 2009, appellant's counsel filed a motion to withdraw, indicating appellant believed that they had irreconcilable differences and that his counsel was not effectively representing him. In August, the court determined appellant was competent, lifted the stay, and denied the motion to withdraw but permitted the case to be reassigned within the Public Defender's Office. In October, the trial was rescheduled for March 2010.
- In January 2010, appellant filed another motion requesting that new counsel be appointed. The court granted the motion, and a contract attorney was appointed to represent him. In March, the court reset the trial for August 2010, apparently to allow the new attorney to become familiar with the case. Several weeks later, however, that counsel filed a motion to withdraw, citing a breakdown in communication and appellant's

lack of confidence in her ability to represent him at trial. The court granted the motion and appointed new contract counsel, who ultimately represented appellant at trial and represents him in this appeal.²

In addition to the motions outlined above, appellant filed a number of pretrial motions, including a motion to designate the case as complex, which was granted; a motion for change of judge, which also was granted; a motion to dismiss, alleging appellant's speedy-trial rights had been violated, which was denied; and a motion for forensic testing for gunpowder residue on swabs reportedly taken of appellant's hands when he was arrested, which was denied. In July 2010, appellant filed a motion to continue the trial date thirty days, which was granted. The matter finally proceeded to trial on September 21, 2010, and appellant was convicted and sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Speedy Trial

Appellant first argues the trial court erred in denying his motion to dismiss based on a violation of his right to a speedy trial under Rule 8, Ariz. R. Crim. P., and

²Counsel filed a motion to withdraw in this court, apparently at appellant's request, which we denied.

article II, § 24 of the Arizona Constitution.³ We will not reverse the court's ruling absent an abuse of discretion and resulting prejudice. *State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997). Although Rule 8 and article II, § 24 both involve the right to a speedy trial, each requires a distinct analysis; we therefore address them in turn. *See id*. at 136-39, 945 P.2d at 1267-70; *State v. Vasko*, 193 Ariz. 142, ¶ 19, 971 P.2d 189, 193 (App. 1998).

Rule 8

We first consider appellant's speedy-trial rights under Rule 8 because, if dispositive, the constitutional issue need not be reached. *See Humble v. Superior Court*, 179 Ariz. 409, 413, 880 P.2d 629, 633 (App. 1993). Rule 8 requires that a defendant in custody be tried within 150 days of arraignment unless the case is designated "complex," in which event the time limit is extended to 270 days. Ariz. R. Crim. P. 8.2(a). The right to a speedy trial under Rule 8 is not fundamental, but procedural, and a defendant must object to a potential violation before the time limit expires to avoid waiving the issue. *See* Ariz. R. Crim. P. 8.1(d); *Spreitz*, 190 Ariz. at 138, 139, 945 P.2d at 1269, 1270; *State v. Swensrud*, 168 Ariz. 21, 23 & n.3, 810 P.2d 1028, 1030 & n.3 (1991). This requirement seeks to prevent defendants from waiting to raise the issue until time has

³Appellant does not assert a violation of his speedy-trial rights under the United States Constitution. *See* U.S. Const. amends. VI & XIV; *Barker v. Wingo*, 407 U.S. 514, 515 (1972).

expired and the trial court can no longer prevent a violation. *See Swensrud*, 168 Ariz. at 23, 810 P.2d at 1030.

Here, appellant does not dispute that his case was designated as complex, but argues, as he did below, that this was only for billing purposes and not for purposes of Rule 8.⁴ We need not decide that issue, however, because appellant concedes he did not raise his speedy-trial objection until after the time limit prescribed by Rule 8 had expired. Because he allowed the time limit to expire without objection, appellant cannot now claim a violation that requires reversal. *See Spreitz*, 190 Ariz. at 138, 945 P.2d at 1269; *Swensrud*, 168 Ariz. at 23, 810 P.2d at 1030.⁵

Article II, § 24

Having determined that Rule 8 does not provide appellant with a basis for relief, we next determine whether his right to a speedy trial under the Arizona Constitution was violated. The constitution guarantees criminal defendants "a speedy public trial" but, unlike Rule 8, does not provide a precise timeframe within which a defendant must be tried. Ariz. Const. art. II, § 24; *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. Rather, in determining whether trial delay warrants reversal under article II, § 24, Arizona courts apply the same four-factor analysis set forth by the United States Supreme

⁴Appellant's argument is contradicted by the trial court's written order, apparently prepared by appellant's counsel, which explicitly "designat[ed] the case complex pursuant to Rule 8.2(a)(3)."

⁵We therefore need not address the issue of which pre-trial continuances excluded time for purposes of Rule 8.

Court in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972). *Spreitz*, 190 Ariz. at 139, 945 P.2d at 1270. This test weighs (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant has demanded a speedy trial, and (4) the prejudice to the defendant. *Id.* "In weighing these factors, the length of the delay is the least important, while the prejudice to the defendant is the most significant." *Id.* at 139-40, 945 P.2d at 1270-71.

- Appellant was arraigned on October 24, 2008, and his trial began on September 21, 2010—almost two years later. Although Rule 8 time frames do not govern our constitutional analysis, the 697-day period before trial in this case is significantly longer than the rule's 150-day limit for in-custody defendants as well as the 270-day limit for defendants in complex cases. Ariz. R. Crim. P. 8.2(a). This delay is inordinate but not extreme, and therefore weighs slightly in favor of appellant's position. *Compare Humble*, 179 Ariz. at 416, 880 P.2d at 636 (five-year delay caused by state in DUI prosecution sufficient for dismissal when other factors also favored dismissal), *with Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271 (five-year delay, though presumptively prejudicial, insufficient to vacate conviction where other factors weighed against reversal).
- As the trial court found, however, much of the delay was for appellant's benefit. He changed counsel four times before the case ultimately went to trial, causing significant delay in the aggregate, some of which was to allow new counsel to become familiar with the case and prepare for trial. He also moved for a Rule 11 mental-health

evaluation, which resulted in a lengthy stay of the proceedings between March 10, 2009, when the motion was granted, and August 10, 2009, when appellant was found competent. These delays were either sought by appellant or effected for his benefit. Accordingly, the second factor, which requires consideration of the reasons for the delay, does not support finding a speedy-trial violation.

- As for appellant's demand for a speedy trial, appellant first asserted his speedy-trial rights over a year and a half after his arraignment. The trial court found, and appellant does not dispute that between his October 2008 initial appearance and his April 2010 motion for change of judge, he "never asserted his right to a speedy trial or objected to any of the continuances that were granted by [the court]." Consequently, the right was not "promptly asserted." *State v. Adair*, 106 Ariz. 58, 60, 470 P.2d 671, 673 (1970). Moreover, in August 2010, the court informed appellant that the September trial date would be outside of the Rule 8 timeline and asked if he would like to have the trial sooner, to which appellant replied, "No, I'll have it when it's supposed to be, when it's already set." For these reasons, this factor also weighs against finding a speedy-trial violation.
- We turn finally to the fourth factor, the prejudice suffered by appellant. He initially suggests he need not show prejudice to establish the denial of his constitutional right to a speedy trial. Relying on *Snow v. Superior Court*, 183 Ariz. 320, 325, 903 P.2d 628, 633 (App. 1995), he contends, "where actual prejudice cannot be shown, dismissal without prejudice is the appropriate remedy." *Snow* is distinguishable on this point,

however, because that case was before this court as a special action, and our order dismissing the indictment came before the case had proceeded to trial. *Id.* at 322, 326, 903 P.2d at 630, 634. The present case, on the other hand, is before us on direct appeal after a conviction. Accordingly, because we will not vacate a conviction absent prejudicial error, *see* Ariz. Const. art. VI, § 27; A.R.S. § 13-3987, we conclude appellant must demonstrate prejudice to obtain relief, *cf. Vasko*, 193 Ariz. 142, ¶ 3, 971 P.2d at 190 (under Rule 8 analysis, "in the absence of a showing of prejudice, a speedy trial violation raised as error on appeal after conviction does not warrant reversal of that conviction").

Appellant claims he was, in fact, prejudiced by the delay, pointing to his incarceration "for almost two years before he was given his trial." But any prejudice arising from the length of appellant's incarceration is diminished when balanced against the fact that much of the delay in trying the case was occasioned for his benefit as discussed above, as well as the fact that he sought and obtained a one-month continuance of his trial date after asserting his speedy-trial rights. Moreover, although he refers to his anxiety while awaiting trial, and our supreme court has recognized that time in custody "may have increased [an appellant]'s anxiety quotient," appellant does not suggest, much less establish, that the delay "prejudice[d] his ability to defend against the state's claims." *Spreitz*, 190 Ariz. at 140, 945 P.2d at 1271.⁶ This factor, too, weighs against finding a

⁶Appellant does not argue the delay was presumptively prejudicial, *see Humble*, 179 Ariz. at 416, 880 P.2d at 636, we therefore do not address that issue.

speedy-trial violation. Accordingly, upon considering the *Barker* factors, we find no violation of appellant's constitutional right to a speedy trial under article II, § 24.

Funds for Scientific Analysis

- Appellant next contends the trial court erred in denying his pretrial request for funds to retain an expert to examine for gunpowder residue the clothes he was wearing the night of his arrest. We first, however, address the state's contention that appellant failed to make this argument to the trial court, thereby forfeiting it on appeal.
- Before trial, appellant requested that the trial court grant funds for a gunpowder-residue test on swabs he believed police had taken from his hands on the night of his arrest. Although the motion noted that appellant's clothes had been taken into evidence, it did not indicate or even suggest that he also sought to have the clothing tested for gunpowder residue. During oral argument on the motion, appellant's counsel informed the court that, contrary to his initial belief, police had not taken swabs of appellant's hands. But, again, he did not argue that the clothing should be tested notwithstanding the absence of swabs. The trial court then denied the motion.
- Although counsel may have intended to request that appellant's clothes be tested, we do not find such a request anywhere in the record. In his Motion for Forensic Testing, the request for relief stated, "Defendant is now moving this Court to authorize the retaining of [a forensic expert] for the purposes of conducting gun powder residue tests from the swabs taken by [Tucson Police Department]." And the substance of appellant's argument at the motions hearing likewise focused exclusively on swabs of

appellant's hands. Appellant points to the fact that, after he had acknowledged that police had not taken swabs, he nevertheless "still advised the court of the cost for the gunpowder residue testing," arguing this shows he sought testing of the clothes. Even so, that did not communicate to the court a request to test the clothing. Indeed, the record supports the conclusion that the court denied the motion based on the absence of swabs and does not appear to have considered the incidental mention of clothing during other discussions to have been a request for relief. See supra note 8. Consequently, we conclude no request for funding to test the clothing for gunpowder residue was presented to the trial court, and appellant's argument that the court erroneously denied the request is therefore forfeited on appeal. See Ariz. R. Crim. P. 35.1(a); cf. State v. Petrak, 198 Ariz. 260, ¶ 27, 8 P.3d 1174, 1182 (App. 2000) (issue preserved for appeal only where party gives trial court opportunity to provide remedy).

⁷Neither party refers to two isolated and incidental references to testing the clothing for gunpowder residue. At a hearing on July 6, 2010, appellant's counsel noted that the status of the putative hand swabs was unclear, but that had swabs been taken and tested, "obviously it could negate the necessity to have any clothes tested, which is what [appellant] is interested in." And at a hearing several weeks later, during a discussion about the possibility of moving the trial date, defense counsel informed the court, "[I]f you grant[] the motion for the gunpowder residue testing . . . that's going to take I'm guessing about four to six weeks from the time the clothes actually would get over to the same forensic labs in California." Neither of these remarks sparked a discussion about testing the clothing, and, as noted above, counsel did not discuss the clothing at all when actually arguing the motion to the court. We conclude that neither of these references amounts to a request that the clothes be tested.

Disposition

¶19 For the foregoing reasons, appellant's convictions and sentences are affirmed.

/s/ **Philip G. Espinosa**PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge